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BY HAND DELIVERY
Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128

Dear Mr. Caton:

Please find enclosed for filing an original and four copies of the Personal Communications Industry Association's further comments in the above-referenced proceeding.

Also included is an additional copy of this filing to be date-stamped and returned with our messenger. Please contact me if you have any questions regarding this matter.

Respectfully submitted,

Kent D. Bressie

Enclosures

04-1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	CC Docket No. 96-128

FURTHER COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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Dated: August 26, 1997

SUMMARY

The Personal Communications Industry Association ("PCIA") disputes the Commission's contention that the D.C. Circuit's decision in *Illinois Public Telecommunications Association v. FCC*, No. 96-1394, slip op. (D.C. Cir. July 1, 1997), allows the Commission to continue to impose the interim compensation plan. The Court struck down the interim compensation plan as unlawful, thereby depriving the Commission of the ability to maintain this interim plan unless and until it adopts a new plan in this remand proceeding.

PCIA also anticipates that the record in this remand proceeding will undermine the basis for the Commission's choice of a "carrier pays" system and the basis for the Court's affirmation thereof, and force the Commission to reconsider its decision to reject a "caller pays" system. A "carrier pays" system does not promote the Commission's objective of competition in the market for payphone services. Moreover, a "carrier pays" system does not further the Commission's other objectives of reducing the burdens and costs on callers and the industry.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	CC Docket No. 96-128

FURTHER COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to the Commission's public notice[1] following the D.C. Circuit's decision in *Illinois Public Telecommunications Association v. FCC*,[2] the Personal Communications Industry Association ("PCIA")[3] hereby submits these further comments in the above-captioned

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[1] *See* Public Notice, "Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding," DA 97-1673 (rel. Aug. 5, 1997) ("*Public Notice*").

[2] No. 96-1394, slip op. (D.C. Cir. July 1, 1997) ("*Illinois Public Telecom*").

[3] PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance; the Broadband PCS Alliance; the Specialized Mobile Radio Alliance; the Site Owners and Managers Association; the Association of Wireless System Integrators; the Association of Communications Technicians; and the Private System Users Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

proceeding. PCIA disputes the Commission's contention that the Court's decision allows it to continue to impose the interim compensation plan, which the Court struck down as unlawful, unless and until it adopts a new plan in this remand proceeding. PCIA also anticipates that the record in this remand proceeding may undermine the basis for the Commission's choice of a "carrier pays" system and the basis for the Court's affirmation thereof, and force the Commission to reconsider its decision to reject a "caller pays" system.

I. The Commission Lacks the Authority to Impose Its Interim Compensation Plan, Which the D.C. Circuit Struck Down as Unlawful

The Commission's characterization of *Illinois Public Telecom* in the *Public Notice* is factually wrong, and its claims about the legal effect of the remand decision are incorrect as a matter of law. The D.C. Circuit *did* strike down the provisions of the *Payphone Orders*[4] imposing an interim compensation plan, thereby depriving the Commission of the ability to maintain this interim compensation plan unless or until it adopts an alternative plan in this remand proceeding.[5]

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[4] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order*, 11 FCC Rcd. 20541 (1996) ("*Payphone Report & Order*"); *Order on Reconsideration*, 11 FCC Rcd. 21233 (1996) ("*Payphone Recon. Order*") (collectively, "*Payphone Orders*").

[5] PCIA supports the motion recently filed by a number of IXCs asking the Court to clarify that it did vacate the provisions of the *Payphone Orders* imposing an interim compensation plan, and that if it did not, it should reconsider doing so. *See* Motion for Clarification or, Alternatively, for Partial Rehearing of Cable & Wireless, Inc., the Competitive Telecommunications Ass'n, Excel Telecommunications, Inc., Frontier Corp., LCI International Telecom Corp., MCI Telecommunications Corp., Sprint Corp., Telco Communications Group, Inc., and WorldCom, Inc., No. 96-1394 (D.C. Cir. filed August 19, 1997).

In characterizing *Illinois Public Telecom*, the Commission claimed that

> the court actually vacated only one narrow aspect of [the *Payphone Orders*], *i.e.*, the asset valuation standard [for] transfers of telephone company payphone assets to separate affiliates. The remaining portions of the orders were either upheld, or remanded to the Commission for further consideration and explanation.[6]

The Commission went on to claim that "except for the vacated asset valuation standard, all of the requirements of the *Payphone Orders*—including those portions that were remanded to the Commission—remain in effect pending further action by the Commission on remand."[7] Finally, the Commission claimed that "the effects of applying aspects of the current rules . . . were identified by the court as *potentially arbitrary*."[8] The Commission's conclusions are erroneous.

First, the D.C. Circuit clearly declared the portions of the *Payphone Orders* imposing an interim compensation plan to be "arbitrary and capricious." The Court stated:

> We conclude that *the Commission acted arbitrarily and capriciously* in selecting the interim and permanent rates of compensation for access code and subscriber 800 calls; in requiring only large [interexchange carriers ("IXCs")] to pay [payphone service providers ("PSPs")] for these calls during the first year; in failing to provide any interim compensation to PSPs for so-called "0+"calls and calls from inmate payphones; and in prescribing fair market value for pay-phone assets transferred from a BOC to a separate affiliate.[9]

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6 *Public Notice*, at 1.

7 *Id.* at 1-2

8 *Id.* at 2 (emphasis added).

9 *Illinois Public Telecom*, slip op. at 4.

The Court's language is unequivocal. Moreover, the Court repeated this finding with respect to each portion of the interim compensation plan.[10] Nowhere did it state that some aspects of the Commission's rules were "potentially arbitrary."

Second, by declaring the *Payphone Orders*' interim compensation plan to be "arbitrary and capricious," the court declared unlawful and unenforceable those portions of the Commission's orders. The test for whether or not the Commission may continue to impose a final rule is not the Court's talismanic use of the word "vacate," but instead the practical implications of the Court's findings: whether the Court asked the Commission to provide a fuller explanation, or whether it struck down the final rule as unlawful. As described above, the Court in this case clearly did the latter with each aspect of the interim compensation plan. **The legal authorities cited by the Commission support the contrary conclusion that the Court vacated the interim compensation plan adopted in the *Payphone Orders*.**[11] In *Checkosky v. SEC*, the Court distinguished between cases where it "remanded to an agency for a better explanation

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[10] Regarding compensation for 800 and access code calls during the interim period, the Court found: (1) that "the FCC cites no reasonable justification for an interim rate based on $.35 per call"; (2) that "the $.35 rate . . . cannot stand"; (3) that "[t]he FCC must now set a new interim rate and decide what is to happen once the interim period is over"; and that "the FCC acted arbitrarily and capriciously in requiring payments only from large IXCs . . . for the first phase of the interim plan." *Id.* at 16-17. Regarding compensation for 0+ calls during the interim period, the Court found that "[t]he Commission's failure to provide an explanation for this seemingly illogical decision is arbitrary and capricious. On remand, the Commission must correct this flaw in the interim compensation scheme." *Id.* at 19. Regarding compensation for inmate calls during the interim period, the Court found the Commission's scheme appeared "blatantly inconsistent with the statute" and that the "interim compensation scheme must therefore be remanded." *Id.* at 20.

[11] *See* Public Notice at 2 n.3 (citing *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993) and *Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994) (opinion of Silberman, J.)).

before finally deciding that the agency's action was arbitrary and capricious," and cases where "an agency's failure to state its reasoning or to adopt an intelligible decisional standard is so glaring that we can declare with confidence that the agency action was arbitrary and capricious."[12] In *Allied-Signal, Inc. v. NRC*, the Court simply remanded the agency's decision for a "reasoned and coherent" explanation of its final rule.[13] In the present case, the Court stated definitively that the Commission's actions were arbitrary and capricious. Rather than ask the Commission to provide a better explanation, it found the Commission's actions unlawful and ordered the Commission to reexamine the whole issue of interim compensation. These authorities do not allow the Commission to continue to impose a final rule found explicitly unlawful by a reviewing court unless or until it adopts a different final rule in a remand proceeding.

Third, the Commission bases its entire characterization of *Illinois Public Telecom* on the Court's statement that "we will vacate and remand [the asset valuation standard] portion of the Commission's order for further proceedings."[14] In summarizing its actions with respect to the interim compensation plan and the asset valuation standard, however, the Commission did not distinguish between its actions or single out the asset valuation standard for vacatur. Instead, the Court described its findings with respect to all of the Commission's unlawful actions in one summary statement: "We conclude that the Commission acted arbitrarily and

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[12] *Id.* at 463.

[13] *Allied-Signal*, 988 F.2d at 153.

[14] *Illinois Public Telecom*, slip op. at 28.

capriciously . . . ."[15] According to the Court's decision in *Checkosky v. SEC*, this finding is sufficient to bar the Commission from continuing to impose its interim compensation plan unless and until its adopts an alternative plan.

Fourth, for those portions of the *Payphone Orders* found to be arbitrary and capricious, the D.C. Circuit granted the relief sought by petitioners, *i.e.*, vacatur of the interim compensation plan, among other aspects of the Commission's orders. The Court stated clearly that "we grant in part and deny in part the petitions for review."[16] Many of the petitioners specifically requested the Court to vacate the Commission's interim compensation plan, and the Court did so.[17]

Fifth, the Commission's wild inference from the Court's opinion that Section 276 requires an interim compensation plan—even an unlawful one—is unfounded. The *Public Notice* states that

> because the court held that the failure of the Commission to provide interim compensation for 0+ calls that are not compensated pursuant to contract is arbitrary and capricious and not responsive to the Section 276 requirement that there be compensation for each and every call, the court would similarly find a decision by the

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[15] *Id.* at 4.

[16] *Id.*

[17] *See, e.g.*, Joint Brief of the Interexchange Carriers, Consolidated Case No. 96-1394, at 41 (filed Feb. 14, 1997) ("For the reasons stated, the petitions for review should be granted and the FCC's orders should be vacated."); WorldCom, Inc., Petition for Review, Case No. 97-1039, at 2 (filed Jan. 16., 1997) ("WorldCom requests that this Court hold unlawful, vacate, enjoin, and set aside the FCC's order"); LCI International Telecom Corp. Petition for Review, Case No. 97-1022, at 2 (filed Jan. 10, 1997) ("LCI requests that the Court set aside the [FCC's order]"); Initial Brief of Petitioners/Intervenors Utility Regulatory Commissions of the Various States, Consolidated Case No. 96-1394, at 16 (filed Feb. 13, 1997) ("The FCC's *Order on Payphone Recon. Order* and *Report and Order* are . . . unlawful and should be overturned.").

> Commission to discontinue interim compensation during the remand proceedings as contrary to Section 276. The court's decision to remand but not vacate the interim compensation provisions of the *Payphone Orders* supports this assumption.[18]

This statement completely misconstrues the Court's findings. The Court found that Section 276 requires fair compensation for each and every completed call.[19] The Court did *not* find that the absence of a legal, enforceable compensation plan during a remand proceeding would violate Section 276 so as to require imposition of an *unlawful* plan until a legal one could be adopted. In the Court's opinion, as in the *Payphone Orders*, the term "interim" refers to the two-year period during which PSPs not affiliated with a local exchange carrier ("LEC") would receive compensation for access code.[20] It does *not* refer to the gap between the Court's striking down the Commission's interim compensation plan and the Commission's adoption of a new final rule at the conclusion of this remand proceeding. The Commission must therefore abandon the continued imposition of the interim compensation plan struck down by the D.C. Circuit.

II. Further Information from the IXCs in this Proceeding May Force the Commission to Reconsider Its Rejection of a "Caller Pays" System

PCIA anticipates that the record in this remand proceeding will undermine the basis for the Commission's choice of a "carrier pays" system and the basis for the Court's affirmation thereof, and force the Commission to reconsider its decision to reject a "caller pays" system. Specifically,

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[18] *Public Notice* at 2 n.3.

[19] *Illinois Public Telecom*, slip. op. at 6.

[20] *See id.* at 8.

a "carrier pays" system cannot achieve market pricing. It is now clear that the IXCs cannot or will not employ the technologies cited by the Commission as necessary for a "carrier pays" system. PCIA has reason to believe that these technologies may not be available to all IXCs, and that the basis for a "carrier pays" system may be severely undermined.

In particular, the IXCs have neither the technological ability nor the economic incentive to block calls. Existing technologies will simply not support the blocking regimes envisioned by some IXCs.[21] Other IXCs have stated that they simply will not develop blocking technologies.[22] Furthermore, the IXCs have no economic incentive to block calls.[23]

If, as PCIA suspects, the technologies or economic incentives fail to measure up to the high expectations of the Commission, then the basis for the Commission's "carrier pays" system and the Court's subsequent decision will be destroyed. The Court upheld the Commission's choice of a "carrier pays" system on the basis of the Commission's findings (i) that carriers "can

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[21] Whitepaper on the Provision of ANI Coding Digits of the LEC ANI Coalition, CC Docket No. 96-128, at 7 (filed June 16, 1997) ("LEC Whitepaper") (noting that "if MCI were to set up [its suggested] blocking regimes, neither [the method of querying line information databases ("LIDB/OLNS")] nor [the method of more detailed automatic number identification ("FLEX ANI")] would be useful in effectuating it. . . . [N]either LIDB/OLNS nor FLEX ANI will provide MCI with the information it needs to establish such a system, since neither provides the price charged by the PSPs.").

[22] *Id.* (noting that "AT&T . . . has stated that it is not going to develop call blocking technology").

[23] *Id.* at 6 ("Given [the] market rate for pre-subscribed payphone calls, it is highly unlikely that interexchange carriers will reject similarly-valuable access code calls to avoid a charge of 35 cents. This is especially true given that interexchange carriers can pass such charges through to customers."). The limitations of FLEX ANI also make blocking economically unrealistic. FLEX ANI cannot be provided for payphone calls alone. *Id.* at 7. It would cost "hundreds of millions of dollars" to deploy FLEX ANI ubiquitously on a nationwide basis. *Id.* at 8.

block calls from particular payphones charging excessive rates," (ii) that "[s]ubscribers to an 800 service can utilize a carrier's call-blocking capability by negotiating with the carrier to block calls from payphones with excessive per-call compensation charges," and (iii) that carriers can and will develop blocking technology."[24] Information gathered by PCIA and its members indicates that the Commission's findings regarding blocking technology are inconsistent with the capabilities of the IXCs at present and in the foreseeable future. In light of the foregoing concerns about the ability of the IXCs to employ the technologies necessary for the "carrier pays" system envisioned by the Commission, the Commission will likely need to reconsider its decision to reject a "caller pays" system. The Commission should consider that a "carrier pays" system does not promote competition and does not serve the Commission's other objectives.

A. A "Carrier Pays" System Does Not Promote Competition

The 1996 Act sought to promote "competition among payphone service providers" and "the widespread deployment of payphone services to the benefit of the general public."[25] The Commission concluded that "the most appropriate way to ensure that PSPs receive fair compensation for each call," and to promote PSP competition, "is to let the market set the price" for payphone calls.[26] The Commission recognized that fair compensation could best be achieved

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[24] *Id.* at 20.

[25] 47 U.S.C. § 276(b)(1).

[26] *Payphone Report & Order*, 11 FCC Rcd. at 20567.

"when the caller has the information necessary to make an informed choice as to whether to make the call and incur the compensation charge."[27]

Nevertheless, the Commission has abandoned the premise that the market should set the rate of compensation for 800 calls by promulgating a rule that ensures that a competitive market for such calls *could not* exist by requiring IXCs—and not callers—to compensate the PSPs.[28] But if a caller incurs no charge to place a payphone call, the caller will not care if the call costs $0.10 or $10. Thus, a caller has no incentive to impose market discipline on PSPs by "price-shopping" for payphones. The "market," therefore, cannot set the price in the manner envisioned by the Commission.

No entity but the caller has the incentive or ability to eliminate existing market distortions. Because the Commission's rule permits IXCs to pass along their costs to 800 number subscribers, such as paging companies, IXCs will have little incentive to police those costs. The Commission stated that "[i]f charges are not passed on . . . the called party's incentives for accepting or declining a particular call will be distorted."[29] But the record demonstrates that *call recipients* have no way of knowing the origin of a particular call, and thus no basis for deciding whether to accept or decline that call.[30] Indeed, paging customers cannot "reject" a page. The Commission

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[27] *Id.* at 20551.

[28] *See id.* at 20583.

[29] *Id.* at 20550.

[30] *See* AT&T Reply Comments, CC Docket No. 96-128, at 4 n.8 (filed July 15, 1996). *See also* Personal Communications Industry Association Comments, CC Docket No. 96-128, at 3 (filed July 1, 1996); Paging Network, Inc., Petition for Limited Reconsideration, CC Docket

[Footnote continued on next page]

emphasized that "consumers who contract with an IXC for the ability to receive subscriber 800 calls"—*e.g.*, paging companies—"need to be informed of the charges they will face" so that the market can function properly.[31] Subscribers for 800 numbers, however, cannot know the cost of each call, and thus have no basis for deciding whether to accept or reject a call. Therefore, they cannot affect the payphone "market."

B. A "Carrier Pays" System Does Not Further the Commission's Objectives

In implementing the payphone provisions of the Telecommunications Act, the Commission sought to "minimize[] transaction costs on the caller and on the industry."[32] The Commission adopted a "carrier pays" system because it is purportedly "the least burdensome, most cost effective manner" of "plac[ing] the payment obligation on the primary economic beneficiary" of payphone calls.[33] A "carrier pays" system, however, is *more* burdensome *and* costly than a caller-pays system and imposes significant burdens on virtually every participant in the payphone market *other* than the caller.

[Footnote continued from previous page]
No. 96-128, at 17 (filed Oct. 21, 1996); AirTouch Paging Petition for Reconsideration, CC Docket No. 96-128, at 7 (filed Oct. 21, 1996).

31 *Payphone Report & Order*, 11 FCC Rcd. at 20549-50.

32 *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Notice of Proposed Rulemaking*, 11 FCC Rcd. 6716, 6730 (1996) ("*Payphone NPRM*").

33 *Payphone Report & Order*, 11 FCC Rcd. at 20584.

First, the Commission's rule imposes costly burdens on IXCs, who must implement a system for tracking each 800 call made from a payphone and for identifying the phone used for each call.[34] The Commission has conceded that "the ability to track toll-free calls has not been developed fully," and that there are "current difficulties in tracking such calls."[35] It has also recognized that "per-call tracking capability will require new investments for some carriers."[36]

Second, the carrier-pays system burdens LECs, who must provide IXCs with quarterly lists of automatic number identifications ("ANIs") for all payphones in the LEC's service area.[37] LECs would also need to "provide verification of disputed ANIs on request," and notify IXCs when a payphone is disconnected.[38]

Third, the compensation scheme imposes substantial burdens on 800 number subscribers, particularly paging companies. These companies cannot track calls from payphones. Therefore, they can neither predict the costs that will be imposed on them by IXCs or collect per-call charges from customers. The best these companies could do is restructure their billing system to spread the compensation costs over all customers. This would require renegotiating existing contracts and restructuring future contracts.

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34 *See id.* at 20567, 20590-91.

35 *Id.* at 20544, 20590, 20591.

36 *Id.* at 20591. IXCs must also develop a system for remitting payment to PSPs and for passing costs on to 800 number subscribers.

37 *Id.* at 20597.

38 *Id.*

Finally, the Commission's rules perpetuate the very regulatory regime that the 1996 Act sought to dismantle.[39] Among other requirements, IXCs must provide the Commission with "annual verification of their per-call tracking functions" upon request, and file annual reports with the agency listing the total compensation paid to each PSP.[40]

On the other hand, imposing the charge on the *caller requires simply that the caller deposit a coin* or use a credit card in order to make an 800 call. With no analysis, the Commission leaped to the conclusion that this would unduly burden callers and increase transaction costs by requiring callers to "acquire coins to make such calls."[41] Yet consumers know that payphone calls often require a coin. There is no evidence that most callers believe that the only payphone call they will make will be an 800 call. Moreover, callers expect "toll-free" 800 calls to be "free" only to the extent that the they will not have to pay the *long-distance* charge -- the "toll." There is no basis in the record for concluding that callers do not expect to pay to use a payphone.

Moreover, in evaluating the benefits and burdens of a "carrier pays" system, the Commission erroneously determined the chief beneficiary of payphone calls. The Commission found that "the primary economic beneficiary [of subscriber 800 calls] is the carrier that carries the call. In addition, . . . it is the called party that receives greater economic benefit from the

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[39] *See* Pub. L. No. 104-104 preamble (purpose of Act is to "reduce regulation").

[40] *Payphone Report & Order*, 11 FCC Rcd. at 20592, 20596-97.

[41] *Id.* at 21275.

payphone call than the calling party."[42] To the contrary, the primary beneficiary of *payphone* calls is manifestly the caller, as recognized in the Act.[43] The entity that receives the greatest *economic* benefit is the PSP; it should be responsible for "billing" these calls by requiring a coin deposit. In reconsidering a "carrier pays" system, the Commission should reexamine who bears the burdens and reaps the benefits of such a system and of payphone calls generally.

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[42] *Id.* at 21275.

[43] *See* 47 U.S.C. § 276(b)(1) (purpose is to "promote the widespread deployment of payphone services to the benefit of the general public").

CONCLUSION

For the foregoing reasons, the Commission must refrain from imposing its interim compensation plan pending the conclusion of this remand proceeding because the D.C. Circuit overturned the interim compensation plan as unlawful. Furthermore, the Commission should reconsider its decision to reject a "caller pays" system because a "caller pays" system would better serve the Commission's objectives in deregulating payphone services, particularly in achieving a market pricing.

Respectfully submitted,

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Its Attorneys

Dated: August 26, 1997

CERTIFICATE OF SERVICE

I, Kent D. Bressie, do hereby certify that a copy of the foregoing Further Comments of the Personal Communications Industry Association has been sent by hand delivery (*) or by first-class mail, postage prepaid, on this 26th day of August, 1997 to the following:

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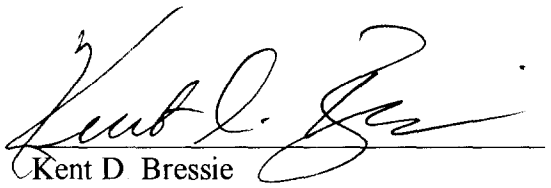

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